REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

CRIMINAL APPEAL NO.34 OF 1997

1. AMOS ONDISO ORARO

2. MUSYOKI MUNYOKI

3. PHILLIP KIVINDUI

4. JAMES MUTHUI .....
.....
APPELLANTS

VERSUS

REPUBLIC .....
.....
. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa & Justice Waki) dated 18th December, 1996,
in
H.C.CR.A. NOS. 546,547, 548 & 551)
****

JUDGMENT OF THE COURT

Of the three counts of robbery for which the appellants were charged before the Kilifi Senior Resident Magistrate's Court, the first and third counts were under **Section 296(1) of the Penal Code while** the second count was under **Section 296(2)** of the same Code. The robbery had taken place at the home of Chrispine Yongo (P.W.1) on the night of 24th November, 1993, at about 8.30 p.m. lasting about one and half hours. After a full trial, the trial magistrate held that the appellants did take part in the robbery at this home but that although they were said to have been armed, they did not use violence of

any significance in the course of the robbery. On that account, the learned trial magistrate reduced the charge of capital robbery above mentioned to that of simple robbery contrary to **Section 296(1) of the Penal Cod e** and accordingly convicted the appellants on all the three counts for the offence of robbery contrary to **section 296(1) o**f the Penal Code and on the first, second and third counts sentenced each one of them to 9 years' imprisonment together with 3 strokes of corporal punishment; 3 years' imprisonment together with 2 strokes of corporal punishment; and 1 year imprisonment together with 1 stroke of corporal punishment respectively.

The prison sentences were to run concurrently. On their first appeal to the superior court, that court held that sufficient evidence had been tendered at their trial but purporting to follow the decision of this Court in **Johana Ndungu v. Republic**, Cr. A. No.116 of 1995 (unreported), which is unrelated to the powers of that court, the first appellate court appears to have substituted the first count with that of robbery with violence contrary to **Section 296 (2) of the Penal Code** and reinstated the charge of capital robbery in the second count and proceeded to sentence each of the appellants to suffer death in the manner authorized by law. The conviction and sentence on the third count appears to have been uninterfered with.

On the night in question, the appellants had invaded the home of P.W.1 posing as police officers in pursuit of thugs who had allegedly ran towards the servant's quarters in that home. They then took hostage P.W.1., his wife, Elizabeth Yongo (P.W.2) and their house servant Charo Kazungu (P.W.3) whom they tied with ropes on their hands and legs. They then ransacked the servant's quarters where they took a radio, two shirts, a wrist watch, one chain and a scout knife all valued at Kshs.2,500/=.Meanwhile, two of the appellants untied P.W.1 and took him to the main house where they took two pairs of safety boots, six bottles of whisky, a table clock, a wall clock, a television set, a video cassette player, a weighing machine and several other items of clothing. At the same time, the appellants forcibly took from P.W.2 her golden wedding ring from her finger and a necklace. Subsequently the appellants locked their hostages in the servant's quarters from the outside and left the home of P.W.1 in his motor vehicle registration No. KAB 252, make, Peugoet 504 saloon valued at K.shs.500,000/= after ensuring that they had punctured the tyres of the only other available motor vehicle at that home, Toyota in make. The former motor vehicle was later recovered at Miritini Estate in Changamwe, Mombasa Mainland.

According to P.W.1, P.W.2, and P.W.3 there was sufficient light in the servant's quarters from the wick lamp that was there and in P.W.1's main house where there was a pressure lamp. Through the light from these sources, these witnesses were able to identify the appellants and in an identification parade conduncted 15 days later, they respectively identified the appellants as the persons who had robbed them on the material night. In the course of police investigations, several items stolen from P.W.1's home on the night of the robbery were recovered from the appellants which were subsequently identified by P.W.1. P.W.2 and P.W.3. It was on the basis of this evidence that the appellants were convicted by the trial court as is outlined at the beginning of this judgment.

The appellants' complaint before us is that they were not correctly identified as the persons who in pretence of being police officers in pursuit of thugs stormed the home of P.W.1 and committed the offences for which they were charged and tried before the Kilifi Senior Resident Magistrate's Court.They also complain of the substitution of their conviction of simple robbery on all the three counts referred to above by the trial magistrate to that of capital robbery in the first and second counts by the first appellate court.

As concerns identification of the appellants as the perpetrators of the robbery at the home of P.W.1 on the night of 24th November, 1993 at about 8.30 p.m., it would seem to us that the light in the servant's quarters and in P.W.1's main house, their proximity to their victims as briefly outlined above and the duration of the robbery were factors favouring their correct identification by P.W.1, P.W.2 and P.W.3. Coupled with their identification by these witnesses at the identification parade conducted on 9th December, 1993 together with the recovery from their respective possession of some of the items stolen from the home of P.W.1 during the robbery in question which said items were identified by P.W.1, P.W.2 and P.W.3, we are in no doubt that the appellants were the robbers who committed the robbery in respect of which they were charged.

The circumstances obtaining to what happened at the home of P.W.1 at the material time disclosed the offence of capital robbery contrary to **section 296 (2) of the Penal Code** on each of the three counts in respect of which they were charged and tried. Unfortunately, only the second count related to capital robbery in respect of which adequate evidence was led before the trial magistrate who reduced the charge in that count to one of simple robbery contrary to **section 296 (1) of the Penal Code.** As indicated earlier in this judgment, the first appellate court aware of these circumstances attempted to substitute the appellants' conviction in the first and second counts to that of capital robbery from that of simple robbery.

The Criminal Procedure Code has only two clear sets of provisions relating to substituted convictions. These are set out in **sections 179 to 191** and in **section 361 (4**) of the said Code. Any other provisions therein in this regard can only be the subject of strained interpretation with possible error of law. The latter section concerns the Court of Appeal on second appeals while the former sections are of general application in this regard.As was pointed out therefore by this Court in **Raphael Oyondi Omuside v. Rpublic**, Cr. A. No.23 of 1991 (unreported), in altering the finding in an appeal against conviction and substituting therefor a conviction for an offence other than that charged, the High Court in its appellate jurisdiction can only act within the provisions o**f sections 179 to 191**, both inclusive, **of the Criminal Procedure Code** and for the purpose of the present appeal, such alteration and substitution were only possible under s**ection 179 of the Criminal Procedure Code** which latter does not permit a substituted conviction of a major offence from a minor offence. It would appear to us therefore that the first appellate court in the appeal before us had no jurisdiction to substitute the appellants' conviction in the first and second counts referred to earlier in this judgment from that of simple robbery to that of capital robbery. Section 361 (4) of the Criminal Procedure Code, however, is in the following terms:

> "361. (4) Where a party to an appeal has been convicted of an offence and the subordinate court or the first appellate court could lawfully have found him guilty of some other offence, and on the finding of the subordinate court or of the first appellate court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the subordinate court or by the first appellate court a conviction of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the subordinate court or by the first appellate court as may be warranted in law for that other offence." In the instant appeal, the trial court could have lawfully found the appellants guilty of capital robbery contrary to section 296 (2) of the Penal Code in the second count laid against them and indeed that court was satisfied of facts which proved the appellants guilty of that offence.

In the result, while setting aside the first appellate court's purported substituted conviction of the appellants on capital robbery in the first and second counts as are set out at the beginning of this judgment, we, nonetheless, substitute their conviction by the trial court of simple robbery contrary to **section 296 (1) of the Penal Code** in the second count with that of capital robbery contrary to **section 296 (2)** of the same Code for which they were charged in that court and substitute their respective sentence of 3 years' imprisonment together with 2 strokes of corporal punishment with that of death in the manner authorized by law. To this end the appellants' appeal fails.

Dated and delivered at Mombasa this 18th day of July, 1997.

J.E. GICHERU

.....

JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

G.S. PALL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR